NO. 85746-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICK JIMI LYONS,

Petitioner.

APPEAL FROM THE SUPERIOR COURT
FOR YAKIMA COUNTY

AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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SUMMARY OF ARGUMENT

The policies behind the constitutional requirement of timeliness in submitting information to the warrant issuing magistrate are: 1) to insure that probable cause actually exists at the time a search is authorized, and 2) to avoid staleness which vitiates probable cause and permits baseless invasions of privacy. While it is important that the search warrant affiant inform the magistrate when an informant provided information, it is *essential* that the affiant explicitly advise when the informant made the relevant factual observations. These are analytically two separate issues and the absence of information on the second question is fatal to the validity of a search warrant issued without it.

To the extent *State v. Partin* is ambiguous or inconsistent with these fundamental principles, it should be disavowed or overruled. Accordingly, the decision of the Court of Appeals below should be reversed and the suppression ruling of the trial court reinstated.

WACDL's Position: WACDL urges adoption of the strong majority position, under both the 4th Amendment and Art. I, sec. 7, that a judge asked to issue a search warrant must be provided a clear and definite statement of the time when the informant made the critical factual observations relied on to establish probable cause for issuance of the warrant.

TABLE OF AUTHORITIES

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I. IT IS ESSENTIAL TO PROVIDE A CLEAR AND DEFINITE STATEMENT OF FACTS IN A SEARCH WARRANT AFFIDAVIT SHOWING WHEN AN INFORMANT'S OBSERVATIONS WERE MADE IN ORDER TO ESTABLISH PROBABLE CAUSE AND

THE FAILURE TO DO SO IS FATAL TO THE VALIDITY OF THE WARRANT

It has long been recognized that it is essential that an affiant applying for a search warrant must provide a clear and definite statement of facts *when* an informant's observations were made in order to establish probable cause for the issuance of the warrant.[1] And, conversely, it is equally acknowledged that the failure to document the *time* of observation is fatal to the validity of the warrant.[2]

In the early case of *Sgro v. U.S.,* the United States Supreme Court held it is "manifest" that a warrant must be supported by "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time.*" *U.S. v. Hython,* 443 F.3d 480, 485 (6th Cir. 2006, emphasis by court), quoting *Sgro v. U.S.,* 187 U.S. 206, 210 (1932). Indeed, it is fair to say that the "prime element in the concept of probable cause is the time of the occurrence of the facts relied upon." *Pierson v. State,* 338 A.2d 571, 573 (Del.Sup.Ct.1975), quoting *Fowler v. State,* 172 S.E. 2d 447 (Ga.App. 1970) and *Sgro v. U.S., supra.*

By 1975 when the Delaware Supreme Court decided *Pierson,* it could be confidently said:

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1 "It seems to be well settled that a specific statement of the time of the observation of the offense on which the affidavit is based must appear therein." Annot. *Requisites and sufficiency of affidavit upon which search warrant is issued as regards the time when information as to offense was received by officer or his informant,* 162 ALR 1406, 1407 (1946).

2 "It is a corollary to the rule stated above that an affidavit which omits altogether to state the time of the observation of the offense on which the affidavit is based is insufficient to show probable cause for the issuance of a search warrant. 162 ALR at 1408.

> "So essential is it that the basic (and so far as we know, unanimous[3]) rule is that failure to state when the alleged facts occurred is fatally defective." 338 A.2d at 573 (cits. omit.)

In his review of American caselaw on this point beginning with the first edition of his treatise in 1978, Professor LaFave has endorsed this principle, noting that the overwhelming weight of authority supports it:

> "If, as concluded above, the time of the occurrence of the facts relied upon is critical in determining whether there is probable cause to search, then surely 'failure to state when the alleged facts occurred is fatally defective.'"

LaFave, *Search and Seizure*, Vol. 1, sec 3.7(b) at p. 693 (1st ed. 1978)(cits. omit); Vol. 2, sec. 3.7(b) at pp. 391-92 (4th ed. 2004)(cits. omit).

This 4th Amendment principle – that the failure to inform the magistrate of the time of the informant's observations of fact is fatal to the warrant – is so manifest that even courts which must consider good faith hold that no reasonable officer can rely on a warrant based on facts with no "temporal proximity to the warrant application." *U.S. v. Hython, supra* 443 F.3d at 488-89; *Nelms v. State*,568 So.2d 384, 388-89 (Ala.Crim.App. 1990) *approved Ex Parte Green*, 15 So.3d 489, 495-97 (Ala.Sup.Ct.2008).

The primary purpose for insisting that the affidavit for issuance of a search warrant inform the magistrate when certain facts were observed is

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3 In a survey of American jurisdictions on this point conducted three decades earlier in American Law Reports, it was categorically stated that "the cases are unanimous in their requirement that the affidavit in order to support a search warrant must contain a reference as to the time when the offense was observed" and a specific statement "is essential for the validity of the search warrant based upon such affidavit." Annot. 162 ALR at 1407. *See also,* Annot. *Search warrant: sufficiency of showing as to time of of occurrence of facts relied on,* 100 ALR 2d 525, 527 (1965).

to avoid the problem of *staleness* – that is, to insure that a person's privacy is not invaded based on information that is out-of-date and now false. A stale warrant is the antithesis of a warrant based on *current* information supporting the likelihood that the items sought by warrant are *currently* at the place alleged. This principle was articulated four decades ago by Division 3 of the Court of Appeals in *State v. Spencer:*

> "[The] facts must be current facts, not remote in time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched *at the time* the warrant is issued."

9 Wn.App. 95, 97, 510 P.2d 833 (1973)(emphasis by court).

The Washington cases have generally recognized the constitutional significance of this point, whether under the 4th Amendment or Art. I, sec. 7. *See, e.g., State v. Spencer, supra* (warrant invalid based on stale 2-month old information); *State v. Higby*, 26 Wn.App. 457, 613 P.2d 1192 (1980)(warrant invalid based on stale 2-week old information); *State v. Young,* 60 Wn.App. 95, 802 P.2d 829 (1991)(warrant invalid based on stale 1-year old information).

In 1988, former Justice Utter summarized the law as follows:

> "The information establishing probable cause may not be stale at the time it is presented to the judge. "It is not enough ... to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued.'"

R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update,* 11 U.P.S L. Rev. 411, 476, sec. 3.3(b) (1988)(quoting *State v. Higby, supra*

and citing *State v. Petty, infra. Id.* C. Johnson, *Survey of Washington Search and Seizure Law: 1998 Update*, 22 Seattle Univ. L. Rev. 337, 402-03, sec. 3.3(b) (1998)(clarifying that the "information establishing probable cause *must* not be stale at the time it is presented to the judge.").

A warrant affidavit which provides *no* information as to when the informant's observations were made *ipso facto* cannot establish probable cause because it necessarily relies on speculation that the facts alleged currently exist. Such a deficient affidavit thus cannot avoid the inevitable condemnation that it is based on stale information. *See, e.g., State v. Larson,* 29 Wn.App. 669, 671, 630 P.2d 485 (Div. 3 1981)("no dates indicating when the recent purchases were made and hence a court cannot determine whether the purchases were sufficiently current to meet the requirements of *State v. Spencer*");[4] *U.S. v. Hython, supra*, 443 F.3d at 483 (court affirms trial court conclusion that "warrant was void for staleness because neither the affidavit nor the warrant specified the date on which the transaction at the defendant's house took place").

The simplest and most common way to avoid this problem is for the affiant to tell the magistrate 1) when the informant made his or her observations, and 2) when the informant reported his or her observations

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4 The anomalous exception to this common-sense and realistic rule is *State v. Clay,* 7 Wn. App. 631, 501 P.2d 603 (1972) where no time-frame at all was set forth. *Clay* is so out of the mainstream that one court canvassing American jurisdictions noted that *Clay* was the *only* case found upholding a warrant based on no reference to the time of observation. *See State v. Baker,* 625 S.W.2d 724, 727 (Tenn.App. 1981). *Compare State ex rel Townsend v. District Court,* 543 P.2d 193, 195 (Mont.Sup.Ct. 1975)("Research has not revealed a single case where the warrant was upheld without a statement showing the time when the facts or events relied upon occurred."). *See also part III, infra.*

to the affiant. Unsurprisingly, this routine protocol has been approved by Washington appellate courts for many years. *See, e.g., State v.Payne*, 54 Wn.App. 240, 773 P.2d 122 (Div. 3 1989)(timeliness of warrant shown by affiant's statement that informant gave information on 5/15/87 that "within the past 3 weeks he was in the residence ..."); *State v. Petty,* 48 Wn.App. 615, 740 P.2d 879 (1987)(timeliness of warrant shown by affiant's statement that informant gave information on 10/14/85 that "within the past two weeks of the above date, this informant went to the above listed residence").[5]

II. THE *LYONS* SEARCH WARRANT IS FATALLY DEFECTIVE BECAUSE THE AFFIDAVIT PROVIDES NO CLEAR AND DEFINITE STATEMENT OF THE TIME OF THE INFORMANT'S FACTUAL OBSERVATIONS

The trial judge in this case faithfully followed and applied the governing law set forth in Division 3's caselaw in *Spencer, Larson* and *Payne, supra.* The judge reviewed a search warrant based on the following crucial language in the affidavit:

> "Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address."

State v. Lyons, 160 Wn.App. at 103; CP 60.

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5 Similarly, the United States Supreme Court has approved search warrants based on applications which clearly established a current timeline. *See, e.g., Jones v. U.S.*, 362 U.S. 257 (1960)(affiant states that on 8/20/57 informant reported that on many occasions "has gone to said apartment ... [t]he last time being 8/20/57"); *U.S. v. Ventresca,* 380 U.S. 102 (1965)(warrant applied for on 8/31/61 based on investigators' observations most recently on "8/30/61 ... an odor of fermenting mash was detected").

This language clearly informs the magistrate that the informant provided information to the affiant within 48 hours of the application for the search warrant. Equally clearly, this language says nothing at all about *when* the informant made the factual observations which were subsequently provided to the affiant and then relied on by him to establish probable cause for the search. Under common English usage, the informant "contacted" the affiant and conveyed information ("stated") and these events happened "within the last 48 hours" of the warrant application. But as to the time when the informant actually made the relevant observations, no date is given and no facts or circumstances are provided which would permit the magistrate "to make an independent judgment as to whether or not the information was current or stale." *Fowler v. State, supra* 172 S.E. 2d at 448; *State v. Larson, supra; U.S. v. Hython, supra* 443 F.3d at 486;

Affidavits for search warrants "must be tested and interpreted by magistrates and courts in a common-sense *and* realistic fashion." *U.S. v. Ventresca, supra* 380 U.S. at 108 (emph. ad.). Thus, the trial court here was obligated to read the affidavit "realistically"[6] to determine whether it contained a "statement as to the time of the alleged offense [which] must be clear and definite." Annot. 162 ALR at 1407. Following this review, the trial judge properly concluded:

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6 *State v. Cord,* 103 Wn.2d 361, 373, 693 P.2d 81 (1985)("While recognizing the need not to review the issuance of search warrants in a 'hypertechnical' fashion, [citing *State v. Partin, infra* and *U.S. v. Ventresca, supra*], it is necessary to review them *realistically*") (Williams, C.J., dissenting).

> "We have absolutely no idea when [the confidential source] made the observation."

State v. Lyons, 160 Wn.App. at 109 (Siddoway, J. dis. op.); I RP at 19.

This conclusion is compelled by sentence structure, logic, common sense and precedent. It is also perfectly consistent with evaluations of similarly deficient language by other courts. *See, e.g., Nelms v. State*, 568 So.2d 384, 386 (Ala.Crim.App. 1990)("There is absolutely no reference to the date or time when the narcotics were observed by the informant."), *approved Ex Parte Green*, 15 So.3d 489 (Ala.Sup.Ct. 2008); *U.S. v. Hython*, 443 F.3d at 486 ("without a date or even a reference to 'recent activity', etc., there is absolutely no way to begin measuring the continued existence of probable cause").

The Court of Appeals below, however, took a far different view of the facts and law. Rather than review the affidavit language in a realistic fashion, the *Lyons* majority determined that the language used was elastic enough to mean either that the informant's report to the affiant was made "within the last 48 hours" or that the informant's report *and* the informant's factual observations *both* were made "within the last 48 hours." Thus, in the majority's view, the affidavit was ambiguous. On the basis of its belief the affidavit was ambiguous, the majority apparently believed it would be "hypertechnical" to hold there was insufficient probable cause to issue the warrant. Based on its construct of an ambiguity, the majority held – without authority – that where under one common sense reading an affidavit would be completely devoid of probable cause but under another

it could be sufficient, the warrant must be upheld. 160 Wn.App. at 107-08.

The *Lyons* ruling violates basic rules of grammar, ignores binding precedent from its own appellate division, and opens the door to future unclear and indefinite affidavits being relied on to obtain warrants.

A. Affidavit is not ambiguous. The *Lyons* majority cites no rules of grammar or usage which support the idea that a subordinate clause ("he/she observed narcotics") incorporates a time frame set forth in a different, independent clause ("within the last 48 hours"). Moreover, the majority cites no caselaw remotely suggesting that its construction is a realistic reading of the English language. The court simply engages in flawed *ipse dixit.* As a Judge Siddoway correctly observes, the majority's reading constitutes a most "unnatural way to present the information" to the magistrate and "[o]nly by a strained reading can the informant's observation be wrapped into the 48-hour time frame." 160 Wn.App. at 108-09. The majority's reading is neither realistic nor common sense – it is nonsense.

Other courts which have reviewed similar language have had no difficulty in concluding there is only one fair common sense reading: the time frame refers only to the time the informant reported to the affiant and not to the time the informant made the factual observations.

In *Nelms v. State*, 568 So.2d 384 (Ala.Crim.App. 1990) the affidavit provided in relevant part:

"Within the last seventy-two hours a confidential informant

> ... stated to the affiant that they have seen Crack-Cocaine in the residence ... ."

The four-judge majority in *Nelms* had no hesitation in declaring that the affidavit language "is deficient because it does not state when the drugs were seen by the informant at the appellant's residence." 568 So.2d at 386. But a dissenting judge argued that the affidavit was "ambiguous" because it was not clear whether the "prepositional phrase" setting forth the seventy-two hours referred to "the time the informant provided the information to the affiant or to the time when the informant observed the contraband" and added police affiants shouldn't be penalized for not being "grammatical technicians." 568 So.2d at 389 The *Nelms* majority responded that, on the contrary, the affidavit language was straight forward:

> "The words 'within the last seventy-two hours' refer to when the informant told this information to the affiant, not to when the informant observed the narcotics in the appellant's residence."

568 So.2d at 386. In 2008, the Alabama Supreme Court expressly approved the *Nelms* majority analysis. *Ex Parte Green, supra* 15 So.3d at 495-97.

But the persuasiveness of *Nelms/Green* goes beyond the common sense and realistic reading of the similar affidavit language. Alabama, unlike Washington, applies the good faith exception to the exclusionary rule. Thus, the *Nelms* court was called upon to determine whether, in light of the affidavit language used, it was so clear and unambiguous that a time of observation had not been presented that no reasonable officer could rely on the warrant issued in its absence. Surely, the dissenter urged,

there must be some residual ambiguity to justify invoking the good faith rule. The *Nelms* majority strongly disagreed: "since there was no reference at all in the affidavit as to when the informant saw the narcotics at the appellant's residence ... the affidavit was deficient on its face." 568 So.2d at 389. The Alabama Supreme Court again approved in *Green. See also, Lewis v. State*, 589 So.2d 758 (1991) where the Alabama Court of Criminal Appeals again held a similar affidavit unambiguously deficient ("within the last seventy-two hours, a reliable confidential informant advised this affiant that said informant had been at the above-described residence and observed") and its Supreme Court again approved in *Green*.

In *People v. Bauer,* 191 Colo. 331, 552 P.2d 512 (Colo.Sup.Ct. 1976) the search warrant affiant stated in relevant part:

> "Within the last 24 hours I have received information from a first time informant that he had seen marijuana ... inside the apartment."

The Colorado Supreme Court discerned no ambiguity in the common sense meaning of this language:

> "[T]he affidavit fails to state, *or in any way indicate, when* the informant was in the defendant's apartment and made the observations he related to the officer."

People v. Bauer, 552 P.2d at 513 (emph. ad.). The Colorado court summarily rejected the state's argument that it was reasonable for the issuing magistrate to infer "that the observations were recent."

> "We are not persuaded by the People's argument. Far more than just the vague inferences involved here as to when the informant saw what he reported are necessary."

The Colorado Supreme Court therefore unanimously affirmed the ruling of the trial judge invalidating the warrant on the ground the "affidavit failed to state the time of the occurrence of the facts relied upon to establish probable cause." 552 P.2d at 512-13.

To the same effect is *Orr v. State,* 382 So.2d 860 (Fla.App. 1980). The affidavit in *Orr* stated in relevant part:

> "within the past ten days a confidential informant ... advised your affiant that a quantity of marijuana was inside the above described premises and that said marijuana was observed ... ."

The Florida appellate court, in harmony with the Colorado and Alabama decisions cited, saw no ambiguity in the words used.

> "The affidavit states *only* that the affiant received information from the confidential informant within the past ten days that marijuana was observed inside appellant's house. *There is no indication as to when the informant actually observed the marijuana.* The affidavit should have contained the specific time or times when the informant observed the marijuana."

Orr v. State, 382 So.2d at 861 (emph.ad.) Words have meaning. Here, the *Lyons* majority has "unnaturally" abused the meaning of words into somesome which they do not say.[7] *Green; Nelms; Lewis; Bauer; Orr, supra.*

B. *Lyons* majority ignored governing precedent from Division 3.

In addition to its misguided linguistic gyrations, the opinion of the *Lyons* majority is notable for its flagrant disregard of governing precedent from its own division. This case could have been easily and correctly

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7 The state unfairly accuses the trial judge of "tortuously parsing the language in order to determine whether there were any other possible interpretations" when in reality it is the Court of Appeals majority which has "tortuously pars[ed] the language in order to determine whether there were any other possible interpretations." Supp. Brf. of Resp. at 5.

decided had the majority cited and followed three binding decisions from its own court.

First, the *Lyons* majority should have cited and followed the principles summarized in *State v. Spencer* four decades earlier. *Spencer* requires an applicant for a search warrant to present "current facts, not remote in point of time" in order to show the magistrate there is probable cause to believe the items sought are on the premises "*at the time* the warrant is issued." 9 Wn.App. at 97 (court's emph.) These principles necessarily require the affiant to tell the magistrate *when* the informant saw the contraband to insure that the information provided is not stale.

Second, for at least a quarter century, as exemplified by *State v. Payne*, a protocol for properly applying for a search warrant has been established. Under this protocol,[8] an affiant need only aver 1) when the informant provided information to the affiant, and 2) when the informant obtained the information relied on.

Third, in a situation like *Lyons*, where the affiant wholly omits any reference to the time the informant obtained the information so that "a court cannot determine whether the [allegations] were sufficiently current to meet the requirements of *State v. Spencer*," there is a *per se* deficiency in the affidavit which negates the validity of any warrant issued pursuant to it. The governing authority on this point is *State v. Larson* which com-

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8 Of course, an application must always meet the 2-prong requirement of *Aguilar-Spinelli. State v. Jackson,* 102 Wn.2d 432, 688 P.2d 136 (1984).

mands a holding that the warrant must be invalidated. 29 Wn.App. at 671.

The *Lyons* majority, however, failed to engage in the analysis required by its own law. The *Lyons* majority failed to acknowledge the required analysis and failed even to cite the governing law. In so failing, the *Lyons* majority erred, and, on the basis of the authority cited, should be reversed. Any other result would leave the law of search warrants in this state confused and in disarray.[9] In its eagerness to overturn the trial court on untenable grounds, the *Lyons* majority seems to have given short shrift to this potentially serious problem.[10]

III. *State v. Partin* SHOULD BE DISAVOWED OR OVERRULED AS IT WAS WRONGLY DECIDED, HARMFUL, AND AGAINST THE GREAT WEIGHT OF AUTHORITY

As shown by the caselaw and treatises cited, the question of timeliness in a search warrant application involves two separate and distinct questions. First, when did the informant provide information to the affiant officer? Second, when did the informant actually make the factual obser-

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9 According to the dissent, the Yakima County Prosecutor's Office has clearly signaled its intent to continue to use deficient affidavits for search warrants which presumably will now be called *Lyons* affidavits. 160 Wn.App. at 109 (noting that "this was not an isolated case of inartful wording, but a manner in which information was presented in other cases and for which sanction was being requested.").

10 Although not addressed in *Lyons* it should be noted that the phrase "being grown" in the affidavit adds nothing to the probable cause equation since it is completely dependent on the magistrate knowing *when* the informant allegedly saw the grow operation. *See e.g. State v. Larson* (phrase "being sold" does not establish time frame); *Aguilar v. Texas,* 378 U.S. 108, 109 ("being kept"). In *State v. Baker,* 625 S.W.2d 724, 727 (Tenn.App.1981) the phrase at issue was "marijuana plants being grown." The court said: "'Being grown' as used in the sentence is a participial phrase modifying the word marijuana. It does not indicate present tense. Therefore, there is nothing in the affidavit from which one could find the alleged criminal activity was currently taking place. The affidavit in support of the warrant is, therefore, insufficient and the search warrant was fatally defective."

vations which the affiant seeks to rely on to establish probable cause? The two questions are analytically severable. *Cf. State v. Jackson, supra* 102 Wn.2d at 437 (recognizing "independent status" of the two prongs of the *Aguilar-Spinelli* test for evaluating sufficiency of search warrant affidavits). A court which conflates the analysis of the two time frames errs.

In *State v. Partin,* 88 Wn.2d 899, 567 P.2d 1136 (1977), this Court reviewed a search warrant affidavit which stated in pertinent part:

> "... based upon information I received on this date, 1-3-75, from a reliable informant, I have reason to believe that marijuana is being kept in the residence of ... "

The defendant objected to the search on the ground the affidavit was defective since it provided no information to the magistrate of the time the informant observed the marijuana and thus violated the constitutional requirement of *State v. Spencer.* 88 Wn.2d at 903-04. While this Court gave approval in principle to the rule in *Spencer* that the facts must be current as of the time of the warrant application, in practice it evaded the principle. It did this by distinguishing the facts of a leading case of the time, *Rosencranz v. U.S.,* 356 F.2d 310 (1st Cir. 1966).

The *Partin* Court pointed out that in *Rosencranz* the affidavit omitted facts on both inquiries – "neither a date of observation of the alleged criminal activity nor a date as to when the affiant received the information was given." 88 Wn.2d at 904. From this distinction the Court erroneously collapsed the inquiry and derived a rule that so long as *one* of the issues was given a time frame then what the Court called "a

reference point" could be established. Based on this so-called "reference point" the Court said a magistrate was free to "determine the current status of the information" in the *complete absence of any factual allegations concerning the current status of the information regarding when the contraband was observed.* 88 Wn.2d at 905. That is, according to the *Partin* Court, once the first inquiry is satisfied and a "reference point" is established, the second inquiry may be satisfied by speculation or assumption without the necessity of any *factual* circumstances being shown.

Unfortunately, the *Partin* Court was lead into error by stopping its analysis at *Rosencranz* and failing to address the actual question presented: What is the proper constitutional analysis when (unlike *Rosencranz)* the first inquiry is properly satisfied (the time of the informant's report to the affiant is documented) but the second is not (the time facts were actually observed is missing)? Had the *Partin* Court analyzed the key question before it, there can be no doubt it would have had to acknowledge that the great weight of authority at the time held it was *essential* that the second inquiry be satisfied only by a clear and definite statement of the time of the informant's observations and, without such a statement, the warrant is fatally defective. *See* cases cited in 162 ALR 1406 (1946) and 100 ALR 2d 525 (1965); *People v. Bauer, supra; Hurd v. State,* 131 Ga.App. 354, 206 S.E.2d 114 (1974); *State ex rel Townsend v. District, supra.*

It is this incomplete analysis which caused Prof. LaFave to criticize

Partin shortly after it was published, *Search and Seizure,* sec. 3.7(b) at n. 52 (1st ed. 1978), and to continue to criticize it today, *Search and Seizure* sec. 3.7(b) at n. 67 (4th ed. 2004) as wrongly decided. LaFave observes that in a very small minority of courts, one of which is Washington, "occasionally the point is missed" that the failure to state when the alleged facts occurred is fatally defective. LaFave takes pains to remind that it "must be emphasized that the time needed is the time of the facts relied upon to establish probable cause, not the time that these facts were conveyed to law enforcement authorities." In this same passage, LaFave characterizes *Partin* as follows:

> "affidavit said informant supplied the information that day, [Washington Supreme] court erroneously says this suffices because 'the magistrate had a reference point by which to determine the current status of the information.'"

While the *Partin* Court was undoubtedly correct that the affiant's statement that information was received by him "on this date" provided a reference point with regard to the date of the affiant's application for the warrant, the same cannot be said for the Court's assertion that it also provided a reference point with regard to the date of the informant's factual observations. The suggestion that this is so, in the complete absence of facts, is illusory at best. *See, e.g., State v. Loder,* 381 A.2d 290 (Maine Sup.Jud.Ct. 1978)(fact that informants reported to affiant on same date affiant applied for warrant utterly meaningless "without specification of the time ... of the illegal acts").

Other courts confronted with this problem have frequently recog-

nized that if only the date of the affiant's receipt of information is provided, there can be no assurance that the information itself is not "ancient." *E.g., State v. Loder, supra* 381 A.2d at 293 (warning of the "danger that information which is 'ancient' may falsely be made to appear as 'present'"); *State v. Winborne,* 273 S.C. 62, 254 S.E.2d 297, 298 (S.C.Sup. Ct. 1979)(where "there is no evidence from which a magistrate or this court can determine how long ago the evidence was seen, the affidavit was defective" because "[i]t could have been many years ago").

If a neighbor today tells an officer he has seen a dead body next door, without a time frame how does the officer know if foul play has just occurred or if instead the information relates to the neighbor's respectful viewing of a deceased neighbor who died of natural causes fifty years earlier? The happenstance that the neighbor made his report today - or within the last 48 hours - by itself says absolutely nothing about *when* the reported events themselves occurred. To the extent the *Partin* decision denies this common sense reality, it is erroneous.

The state here did not cite or rely on *Partin* either in the trial court or in the Court of Appeals.[11] The *Lyons* majority did not rest its decision on *Partin.* Nor did it analyze, attempt to distinguish or even cite *Partin.*

Nevertheless, if *Partin* remains good law in Washington, then arguably any warrant application which states the date an informant

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11 The state mentioned *Partin* for the first time in its supplemental brief to to this Court. *See* Supp. Brf. of Resp. at 3-4.

provided information to the affiant but does not state the date the facts were observed will pass constitutional muster no matter how old and stale those facts may be. There would be no logical stopping point. In all such cases, a magistrate will be free to substitute speculation and assumption for facts. This is an obnoxious result and anathema to the protections of the 4th Amendment and Art. I, sec. 7.

It is time for the Washington Supreme Court to join the vast majority of courts which have held that the failure of a search warrant affidavit to state in clear and definite terms when an informant made the factual observations serving as a basis to establish probable cause renders the affidavit deficient and the warrant fatally defective. *U.S. v. Hython*; *Nelms v. State* (Ala.); *Herrington v. State,* 697 S.W.2d 899 (Ark.Sup.Ct. 1985); *People v. Bauer* (Colo.); *Pierson v. State* (Del.); *Orr v. State* (Fla.); *Hurd v. State,* 206 S.E.2d 114 (Ga.App. 1974); *Bruce v. Commonwealth,* 418 S.W.2d 645 (Ky.Ct.App. 1967); *State v. Thompson,* 354 So.2d 513 (La.Sup.Ct. 1978); *State v. Loder* (Maine); *State v. Rosenthal,* 269 N.W.2d 40 (Minn.Sup.Ct. 1978); *State ex rel Townsend v. District Court* (Mont.); *Morris v. State,* 617 P.2d 252 (Ok.Ct.App. 1980); *Commonwealth v. Conner,* 305 A.2d 341 (Pa.Sup.Ct. 1973); *State v. Winborne* (S.C.); *Schmidt v. State,* 659 S.W.2d 420 (Tex.Cr.App. 1983).

State v. Partin is harmful because it denigrates the neutral role of the magistrate and permits the issuance of stale search warrants on

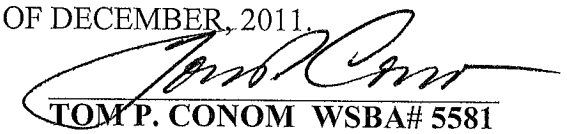
supposition rather than facts.[12] It should be disavowed or overruled.

CONCLUSION

WACDL strongly urges the Washington Supreme Court to adopt the long-standing, well-settled, well-reasoned majority position that before a judge may issue a search warrant, the affiant must provide a clear and definite statement of the time when the informant made the critical factual observations relied on to establish probable cause. This principle governs all warrants sought under Article I, section 7 of the Washington Constitution. WACDL further urges adoption of the corollary to this principle that any search warrant based on an affidavit which omits reference to the time of the observations is deficient resulting an invalid warrant.

To the extent this Court's opinion in *State v. Partin* is ambiguous or inconsistent with these fundamental principles, it should be disavowed or overruled. Accordingly, the decision of the Court of Appeals below should be reversed and the suppression ruling of the trial court reinstated.

DATED THIS 12th DAY OF DECEMBER, 2011.



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12 As Judge Siddoway noted: "An important aspect of probable cause that we rely upon the magistrate to weigh is whether the information of criminal activity is too stale." *Lyons dissent,* 160 Wn.App. at 110. A magistrate cannot perform this important function without *facts* to assess. Anything less simply means the judge is left to *assume.* Assuming is not acceptable. *U.S. v. Hython,* 443 F. 3d at 489 (inferences must be drawn only on "facts" and "*not* on assumptions about ... unasserted but hypothetically possible facts," emph. in text); *People v. Bauer,* 552 P.2d at 513 ("An issuing magistrate may not rely ... on any assumption of immediacy."). Benny Hill's famous aphorism is apt: When one can only *assume* it makes an *"ass"* out of *"u"* and *"me."*